No. 14788

In the

United States Court of Appeals

For the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a corporation, and M. L. BURR,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

KOERNER, YOUNG, McCOLLOCH & DEZENDORF
JOHN GORDON GEARIN
JOSEPH LARKIN
800 Pacific Building
Portland 4, Oregon
Attorneys for Appellees

SUBJECT INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

No. 14788

In the

United States Court of Appeals

For the Ninth Circuit

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a corporation, and M. L. BURR,

Appellees.

APPELLEES' BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

JURISDICTION

This is an action for damages for personal injuries alleged to have been sustained by appellant through the negligence of appellees (Pretrial Order Tr. 3 et seq.). The appellant is a citizen of the State of Oregon (Tr. 3), appellee West Coast Fast Freight, Inc., is a citizen of the State of California (Tr. 3), and appellee M. L. Burr

is a citizen of the State of Washington (Tr. 4). The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 (Tr. 4).

The action was removed by the appellees to the United States District Court for the District of Oregon pursuant to 28 U.S.C.A., Sections 1332 and 1441 (Tr. 4).

This court has jurisdiction by virtue of 28 U.S.C.A., Section 1291.

APPELLEES' STATEMENT OF THE CASE

Appellees agree with the factual portion of appellant's statement of the case; however, a portion of appellant's statement is argumentative, i.e. the nature and extent of appellant's injury and damage.

There was a dispute as to the extent and permanency of appellant's injuries. This dispute was observed by the trial court in discussing appellant's motion for a new trial where, in replying to appellant's counsel's assertion that the damages awarded were inadequate, Judge Solomon said (Tr. 285):

> "Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the acci-

dent. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony."

QUESTIONS PRESENTED

1. Did the court err in refusing to allow appellee to show pain and suffering she claims to have had with a pregnancy which occurred subsequent to the accident when the appellant in the pretrial order did not make a claim in that regard? (Appellant's Specifications of Error I, II and III; Ap. B. 5, 6).

2. Was appellant's explanation to Dr. Jones, who examined her at the request of appellees for the purpose of preparing him to testify, as to how the accident happened, admissible in evidence?

3. Did the court err in refusing to instruct the jury on the life expectancy of a person the same age as appellant? (Appellant's Specification of Error V; Ap. B. 8, 9).

4. Did the court prejudice the appellant by the instructions which explained the issues and told the jury that appellant had a vital interest in the case? (Appellant's Specifications of Error VI and VII; Ap. B. 9, 10).

5. Was the jury's award of $1,500.00 grossly inadequate as a matter of law? (Appellant's Specification of Error VIII; Ap B. 11).

6. Did the court err in refusing to grant a new trial to appellant on the grounds stated? (Appellant's Specification of Error IX; Ap. B. 11).

SUMMARY OF ARGUMENT

I.

The court did not err in excluding evidence of claimed suffering during appellant's subsequent pregnancy for the reason that the subject was not mentioned or claimed by appellant in the pretrial order.

Under the practice of the United States District Court for the District of Oregon, a party at the time of pretrial must apprise his adversary of all contentions he intends to make at the trial, including *evidentiary* contentions.

II.

Appellant's explanation to Dr. Jones of how the accident happened was admissible as a statement against

interest. It was not a self-serving account given to her own doctor and inadmissible for that reason.

III.

The court committed no error in failing to instruct the jury on the life expectancy of a person the same age as appellant, since the evidence showed that appellant was suffering from tuberculosis.

Further, appellant could not have been prejudiced by the court's failure to so instruct, since from the size of the verdict the jury did not believe appellant was permanently injured. Therefore, the life expectancy of appellant was immaterial.

IV.

The court's instructions to the jury were fair and correct.

V.

The jury's verdict was not inadequate as a matter of law in view of the evidence.

VI.

The court did not err in refusing to grant a new trial.

ARGUMENT

I.

The trial court did not err in failing to permit appellant to testify concerning the pain she claims to have suffered in a pregnancy which occurred subsequent to the accident involved in this case.

Such a claim was not made by appellant in the pretrial order, and when appellant, for the first time on trial, made this contention, the appellees were taken by surprise. Appellant did not ask for a continuance to permit appellees to have appellant examined further by a physician in light of this new claim.

It is the practice of the United States District Court for the District of Oregon, with which this court is familiar, to utilize pretrial procedure in every case. In the usual case, counsel agree upon a pretrial order which is, in effect, a consolidated pleading which sets forth the contentions of each party and the issues to be tried. The pretrial order, in this case dated nine days before trial, stated (Tr. 7):

"... that the pretrial order supersedes all pleadings;"

Under this practice, the contentions of each party stated in the pretrial order must be more particular

and exact than the allegations of a complaint under the old code pleading practice.

In the case of *Burton v. Weyerhaeuser Timber Co.*, (D.C. Ore. 1941), 1 F.R.D. 571, 4 F.R.S. 16.32, Case 2, it appeared that plaintiff claimed in the pretrial order that he had been burned by muriatic acid through the negligence of defendant. Without disclosing its intention to do so in the pretrial order, the defendant proved upon trial:

(1) that plaintiff had actually been burned by sulphuric acid;

(2) that muriatic acid is harmless.

The court granted a new trial to plaintiff because he was taken by surprise by this evidence. Judge McColloch observed:

"Parties are expected to disclose all legal and *fact* issues which they intend to raise at trial, save only such issues that may involve privilege or impeaching matter . . .

". . . I can sympathize with the desire of counsel, experienced in the older forms of practice, to withhold disclosure of such dramatic issues until the midst of trial, but it must be made clear that surprise, both as a weapon of attack and defense, is not to be tolerated under the new Federal procedure . . . "Faithfully administered in spirit, as my senior colleagues and I are endeavoring to administer them, the new rules outlaw the sporting theory of justice from Federal courts." (Emphasis added)

In the case of *Curto v. International Longshoremens & W. Union*, (D.C. Ore. 1952), 107 F. Supp. 805, Judge Fee discussed the pretrial procedure of the District of Oregon and particularly the use and effect of the pretrial order. Judge Fee said:

> "The first purpose of these orders is to do away with the delays of common law and code pleading, to define the issues, both ultimate *and evidentiary*, to eliminate false issues and to guarantee that the controverted questions are in good faith contested." (Emphasis supplied)

See also the cases of *Clark v. United States*, (D.C. Ore. 1952), 13 F.R.D. 342, 8 F.R.S. 16.21, Case 1; *Byers v. Clark & Wilson Lumber Co.*, (D.C. Ore. 1939), 27 F. Supp. 302.

Appellant's assertion that appellees had the privilege of all the discovery procedures of the federal rules (Ap. B. 13) does not aid her because, as the above authorities indicate, a party has an absolute duty to disclose his contentions. His adversary has no duty to discover them or to speculate on *possible* contentions.

Appellees have, in the abstract, no quarrel with the authorities discussed by appellant at pages 18 and 19 of her brief concerning the admissibility of evidence. However, the question here is not whether the evidence was competent; it is the question of relevance. This is

admitted by appellant at page 19 of her brief where she states:

> "The evidence sought to be introduced is relevant only if the pretrial order is reasonably interpreted to include the claim . . ."

No such interpretation of the pretrial order is possible. No such claim is made.

It further appears that even if the evidence were admissible under the pretrial order, a proper offer of proof was never made of medical testimony on this subject. During the close of counsel's offer of proof as to what Dr. Abele would have said (Tr. 130-131), the court instructed counsel for appellant to secure the doctor's presence and have him testify in accordance with the offer of proof (Tr. 130-131). Counsel for appellant later advised the court that Dr. Abele could not testify in accordance with the offer of proof and appellant had summoned no doctor who could. This is disclosed by the discussion between the court and counsel for appellant during the argument of the motion for new trial (Tr. 283):

> "The Court: Then you tried to get it in on the testimony, and I said you could not do it in that way, in any event, and you said that you wanted to make an offer of proof. In the first place, I told you to call the doctor back, but then you told me that for the

first time you learned that he was not the doctor who could testify to that.

Mr. Peterson: *That is right.*

The Court: Then you said that the only doctor that could testify would be the obstetrician and you would try to get hold of him.

Mr. Peterson: *Correct.*

The Court: Mr. Peterson, you came here trying to make an opening statement on a subject matter about which you had never talked to a physician, did you not?

Mr. Peterson: No, your Honor.

The Court: When had you talked to the obstetrician?

Mr. Peterson: I received a letter from the obstetrician dated August 9, 1954, and I will read that letter to the Court.

The Court: *Had you made arrangements for the obstetrician to come into court?*

Mr. Peterson: *No, I had not, your Honor.*" (Emphasis supplied)

It is therefore obvious that the appellant could not have been prejudiced by the claimed exclusion of the evidence. In fact, there was no such evidence.

II.

The court did not err in allowing Dr. Jones to tell the jury the story of the accident which appellant related to him.

Appellees do not dispute the general rule stated by appellant at pages 25-27 of her brief to the effect that a doctor who examines an injured person for the purpose of preparing himself to testify and not for the purpose of treatment cannot tell the jury the story of the injured person as to how he was hurt. But, this rule applies only if the doctor is engaged by the party producing him as a witness and does not apply if the doctor is engaged by his adversary.

The reason for the general rule is obvious. A person should not be allowed to consult a doctor for the purpose of preparing the doctor to testify, at that time giving the doctor a self-serving account of how the injuries were sustained and then get the self-serving statement to the jury through the doctor.

However, the reason for this rule vanishes when the doctor involved in engaged by the injured person's adversary. In that event, anything which the person states which is unfavorable to his cause is a statement against interest. See the annotation in 67 A.L.R. at page 39, which annotation is cited at page 27 of Appellant's Brief, where it is noted that the cases universally

held that the statements of a party made to a doctor examining him at the instance of his adversary are admissible.

III.

There is no merit in appellant's contention that the court prejudiced her in failing to include an instruction on the mortality tables in the charge to the jury.

The evidence is uncontradicted that appellant was suffering from "pulmonary tuberculosis, moderately advanced, still considered active. She also had a partial collapse of her left lung by air treatments." (Tr. 124, Appellant's doctor, Dr. Tuhy.)

In the Oregon case of *Frangos v. Edmunds*, 179 Or. 577, 173 P.2d 596, the court discussed the admissibility of the mortality tables in a personal injury case (at page 604 of the official report) saying:

> "Where there is *substantial* evidence of permanent injury, the standard mortality tables *may become* admissible at least *if earning power is permanently impaired.*" (Emphasis supplied)

It was held that failure to give such an instruction did not constitute reversible error.

In the present case, there was little if any real evidence of permanent injury and appellant's earning power was not an issue.

Further, it is obvious from the size of the verdict that the jury did not believe appellant's claims, and, consequently appellant's life expectancy would have been immaterial to the jury and could have had no influence upon it.

The appellant was not prejudiced by the court's failure to give the mortality table instruction.

It further appears that appellant failed to object to the court's failure to give the mortality instruction (Rule 51 of the Federal Rules of Civil Procedure) (Tr. 274).

Because she did not object, appellant may not now assign as error the failure of the trial court to instruct on the mortality tables.

IV.

The court's instructions did not prejudice appellant.

The court's complete charge to the jury commences at page 256 of the transcript. Appellant has taken two parts of the charge out of the context and claimed error for them. However, the instructions considered as a whole were fair to appellant.

One statement of the court which seems to offend appellant was the court's advice to the jury that there was a conflict in the evidence as to whether there was

any permanent injury to appellant's back and coccyx (Tr. 265). The court did not comment one way or the other on this subject other than to point out to the jury that it would have to decide the question (Tr. 265).

The other matter which troubles appellant was the court's advice to the jury that appellant had a vital interest in the case and that the jury could consider this in weighing appellant's testimony. The court's entire charge regarding the manner in which the jury should test the credibility of witnesses is correct and proper (Tr. 267-272). The court's statement to the jury that the plaintiff had a vital interest in the outcome of the case was obviously true and the court may advise the jury of that fact. Appellant has produced no authorities to the contrary (Ap. B. 39).

It further appears that appellant may not assign the above-mentioned instructions as error on this appeal since no objection to the giving of the above instructions was taken by counsel for appellant pursuant to Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 states:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The only objection of appellant to the court's instructions appears at page 274 of the transcript where appellant complained about the court's failure to give an instruction to the effect that,

> ". . . if the weaker or less satisfactory evidence is produced when it appears that a stronger and more satisfactory can be produced, such evidence is to be viewed with distrust."

The court then advised counsel that he could have an exception (Tr. 274) and counsel for appellant then replied, "With that, the plaintiff has no other exceptions." (Tr. 274)

It is obvious from the foregoing that since appellant did not object to the court's instructions relating to the conflict of evidence as to injuries and appellant's interest in the outcome of the case, appellant may not now complain that the court erred in instructing on those matters.

V.

The verdict was adequate based on the record in this case.

The trial court, in his discussions with counsel for appellant at the hearing on the motion for new trial in this case, stated the matter more succintly than appellees could attempt here, as follows (Tr. 285-287):

"Mr. Peterson: My third main point, your Honor, is inadequacy of the verdict. The testimony was that she had occurred 956 dollars, some-odd, special damages, but the jury gave her $1,500. I submit that under the decided cases such a verdict is inadequate, and in the Federal Court, as I understand it, grounds for granting a new trial are—(5)

"The Court: Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the accident. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony.

"Mr. Peterson: Your Honor, if I may, here is what the doctors testified, as I recall it. Dr. Tuhy testified that she had scar tissue on her lungs; that she had a bruised lung as a consequence of this accident, and because of the scar tissue she had bled into the lung, bled into the lung, and that was one of the primary reasons that he hospitalized her for seven weeks at the University Hospital to check to see if there had been exacerbation or aggravation of the tuberculosis, (6) but he thought there was no dissemination of tuberculosis and that she had no permanent injury of the lung.

"Dr. Selling, a neurosurgeon, testified she had a brain injury.

"The Court: Mr. Peterson, you did not listen to his testimony. He did not say that she had a brain injury.

"Mr. Peterson: I should submit, your Honor, he said as evidence by the tests which he did, neurological tests, which had disappeared at the time of the trial, which were residual, the headaches which he thought would disappear within two or three years. That was the essence of Dr. Selling's testimony.

"Dr. Abele testified she had a lumbosacral sprain. It was permanent. It would require reasonably, probably, that she would have to have a spinal fusion; that she had a coccyx injury which would require surgical removal.

"The only adverse testimony medically was that of Dr. Jones, and Dr. Jones said that upon the business occupation from the plaintiff's standpoint, his testimony is that she had a painful coccyx and a painful hip upon his examination. Otherwise, he said he found no objective symptoms of injury.

"Now that is from the worst and the best standpoint of the medical testimony. I submit that it is inadequate.

"The Court: I realize that the plaintiff did not get the verdict that she anticipated getting, and it may very well be that some of the liability elements played a part, but under (7) the decisions I do not believe that the plaintiff is entitled to have a judicial declaration that there is inadequacy in damages because, had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to $1,500 or perhaps even less. I do not think that this is a case in which I should

disturb the verdict of the jury, and the motion is denied."

Judge Solomon's comments fully answer appellant's contention.

Exemplifying the conflict in the evidence concerning the extent of appellant's injuries are the following statements of the doctors who testified.

Doctor Selling, who specializes in internal medicine and neurology, was called by appellant (Tr. 113). He testified (Tr. 121-122):

"Q. Is it your opinion, Doctor, that the headaches will persist for a period of time in the future but then will clear up?

A. That is correct.

Q. Do you have an opinion as to whether or not she has any permanent brain damage?

A. I believe not.

. . .

Q. Then, Doctor, would you characterize this as being temporary brain damage?

A. Precisely.

Q. Doctor, will this patient require any further medical (90) care in respect to that injury?

A. No."

This, from appellant's own witness and in view of her statement in the pretrial order that she suffered "severe brain concussion and brain damage" (Tr. 5).

Dr. Tuhy was called by appellant (Tr. 123). Dr. Tuhy testified (Tr. 135):

"Q. Did this injury affect her tuberculosis?

A. In my opinion, it did not adversely affect the couse of her tuberculosis . . ."

and (Tr. 136):

"Q. Doctor, do you have an opinion as to whether or not there has been any dissemination of the tuberculosis?

A. No, I think not . . ."

and (Tr. 137-138):

"Q. Doctor, I note here, these are your reports from your office, it is your impression under date of April, 1953, as follows, and I am going to read it, and you will correct me if I am reading it wrong:

> 'In my opinion, this patient sustained contusion of the lung in her automobile accident of 5-3 which does not seem to have adversely affected the pulmonary tuberculosis. From the chest (107) standpoint, she would have no permanent disability as a result of the accident.'

That is contained in your record file; is it not, doctor?

A. Yes.

Q. That is correct, is it not?

A. I believe that to be true."

This is appellant's own witness and is most significant in view of her contention in the pretrial order dated nine days prior to the trial (Tr. 6) that appellant "will be permanently affected with the results of aggravation and dissemination of said tuberculosis . . ."

Dr. Jones, who was called by appellees (Tr. 141) summed up his opinion as to appellant's claimed injuries as follows (Tr. 151-152):

> "Q. From the history that you have received from Mrs. Walker, your examination and your study of the X-ray pictures, do you have an opinion as to whether or not these conditions as you now find them will or will not be permanent?
>
> A. They should be taken one by one.
>
> Q. All right, if you will, doctor, please.
>
> A. No. 1: The chief complaint at the present time, that of painful coccyx, the history is there, the patient's story is there, the subjective complaint is there, and I will not deny a painful coccyx. It is now some fifteen to eighteen months after the injury. The condition of painful coccyx commonly is a protruded one, is difficult to treat and is prolonged, but I never have yet seen one that did not respond in time to the proper measures and was not ultimately relieved. In other words, I do not believe that the condition is a permanent one that she will carry with her for the rest of her life. (124)
>
> No. 2, the painful hip: This is of mild nature. There is nothing in the X-ray to suggest that there is any permanent damage to the hip joint; Therefore, I must assume that the condition is a relatively minor persisting involvement of the muscles and ligaments about the hip joint, and if it is such and in the

absence of any arthritis of the hip, it will disappear in time.

Third and fourth, the neck and the lower back: The complaints are there; the objective findings are not there. I am unable to ascertain any disability at the present time as regards the neck and as regards the lower back."

Appellant's contention in the pretrial order was (Tr. 6) "that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest . . ."

The evidence outlined above demonstrates that the verdict was not inadequate and as stated by the trial court (Tr. 278), "Had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to $1,500.00, or perhaps even less."

VI.

Since the trial court committed no error in the trial of this action, as pointed out above, the court did not err in failing to grant appellant's motion for a new trial.

The judgment must be affirmed.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,

JOHN GORDON GEARIN,

JOSEPH LARKIN,

Attorneys for Appellees.